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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

S. DENISE GONZALEZ, an individual; et al., Plaintiffs - Appellees, v. METROPOLITAN TRANSPORTATION AUTHORITY, aka Southern California Rapid Transit District; et al., Defendants - Appellants.	No. 02-55037 D.C. No. CV-96-02785-GHK MEMORANDUM*

S. DENISE GONZALEZ, an individual; et al., Plaintiffs - Appellees, v. UNITED STATES DEPARTMENT OF TRANSPORTATION; et al., Intervenors - Appellants,	No. 02-55045 D.C. No. CV-96-02785-GHK

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

METROPOLITAN TRANSPORTATION AUTHORITY, aka Southern California Rapid Transit District; et al.,

Defendants.

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Argued and Submitted July 24, 2003
Pasadena, California

Before: BOOCHEVER, KLEINFELD, Circuit Judges, and TANNER, District Judge.[**]

In 1996, Denise and Ruben Gonzalez, employees of the Los Angeles Metropolitan Transportation Authority ("MTA"), challenged the constitutionality of random drug and alcohol testing, seeking damages and declaratory and injunctive relief. The district court dismissed their complaint for failure to state a claim. We reversed and remanded. Gonzalez v. MTA, 174 F.3d 1016, 1020 (9th Cir. 1999). On remand, the district court granted summary judgment for the

[**] The Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

Gonzalezes and entered a permanent injunction barring random drug testing of Denise or Ruben. (Their claims for declaratory relief and damages have been stayed in the district court pending this appeal.) The MTA and intervenors the United States Department of Transportation appealed. We review the district court's grant of summary judgment de novo, see Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1175 (9th Cir. 2002), and we now reverse the district court's grant of summary judgment.

I. Mootness

The MTA argued that Denise's request for injunctive relief was moot because she left her job with the MTA in 1997 and moved to Arizona, where she and Ruben bought a home in 2000 after selling their home in California. Ruben continues to work at the MTA and divides his time between Arizona and California. Denise testified that she would "definitely" return to her job and move back to Los Angeles to rent a home if her job became available to her and if the random drug testing were ruled unconstitutional. [ER p. 335] The district court found that Denise's claim for injunctive relief was not moot. We review de novo, see id. at 1173, and we agree.

"[A] case is moot only where no effective relief for the alleged violation can be given." Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1094 (9th Cir.

2003). "The party asserting mootness has the heavy burden of establishing that there is no effective relief remaining for a court to provide." Oregon Advocacy Center v. Mink, 322 F.3d 1101, 1116-17 (9th Cir. 2003) (quotations omitted). Although it is close, we conclude that the MTA has not met that burden. Denise's sworn testimony is that she will return to California if she can work at the MTA without being subject to random drug testing. A permanent injunction against such testing would be effective relief as to Denise. The MTA relies on Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982), but in that case the court found that a case regarding educational placement was moot where parents had sued on behalf of a child who had turned eighteen, married, left the defendant school district, and stopped attending school altogether. Her vague statement that she would return to the district to pursue her education, without an indication of when this would occur, made her return "speculative" and her case moot. Id. at 1168. In this case, Denise has unequivocally testified that she will move back to California and seek to return to her job if she will not be subject to random testing.

II. Random drug testing

Federal regulations issued under the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 5331, require random testing of mass transit employees in "safety-sensitive functions," including anyone who operates a

"revenue service vehicle" such as a city bus, including when not in service, or who "[c]ontrol[s] dispatch or movement of a revenue service vehicle." 49 C.F.R. § 655.4. Under these regulations, the MTA tested Denise, a bus dispatcher, and her husband Ruben, a "transit operations supervisor/instructor." Our prior decision reversed the district court's dismissal of the Gonzalezes' challenge to the testing, and remanded their claim that the tests violated their rights under the Fourth Amendment, because we did not have sufficient information regarding what the Gonzalezes' jobs entailed or the effectiveness and privacy of the testing procedure. See id. at 1024.

On remand, the district court considered the three factors that must be balanced when evaluating "special needs" drug testing: (1) the nature of the privacy interest involved; (2) the character of the intrusion; and (3) the "nature and immediacy" of the government's need for testing and the efficacy of the testing for meeting it. See Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 657-60 (1995). The court found that Ruben had a slightly diminished expectation of privacy, although Denise did not, and that the tests were performed in the least obtrusive way possible and were quite reliable. The only remaining issue was whether the safety aspects of the Gonzalezes' jobs justified the intrusion on their Fourth Amendment rights.

It was not disputed that the Gonzalezes' job descriptions called for them to perform, or to be ready to perform, safety-sensitive duties, and the Gonzalezes do not argue that their job descriptions were inaccurate. Denise's dispatch duties included responding to emergencies and calling the police when necessary. Ruben was required to hold a commercial drivers' license with an endorsement allowing him to carry passengers, and to be prepared to drive a bus under a variety of circumstances. Nor was it disputed that they had been called upon to perform those duties in the past. Nevertheless, the court granted the Gonzalezes' cross-motion for summary judgment and granted the request for a permanent injunction against their testing, holding that because the Gonzalezes had only infrequently performed some of their safety-sensitive duties, their jobs had only a "minimal" impact on safety and the intrusion on Fourth Amendment rights could not be justified.

This result cannot be squared with our precedent. This court has upheld as constitutional random drug testing of employees who may be called upon to perform safety-sensitive tasks, regardless of frequency. In Int'l Bhd. of Elec. Workers, Local 1245 v. United States Nuclear Reg. Comm'n, 966 F.2d 521, 526 (9th Cir. 1992) we upheld random testing of clerical workers in protected areas of a nuclear plant where their union could not establish that workers "did not engage

in any safety-sensitive work" (emphasis added). It was enough that "at least some" of the workers entered vital areas and "may have safety-related responsibilities." Id. In AFGE Local 1533 v. Cheney, 944 F.2d 503, 506 (9th Cir. 1991), we upheld the random testing of engineers who were required to hold top secret access clearances, even though they might not ever actually handle classified information. "Holding the security clearance provides access enough . . . . Considerations of other characteristics of the employees' jobs, including the frequency with which the employees are likely to be exposed to classified information, are irrelevant." Id. at 506, 509.

The government has a compelling interest in "ensuring the sobriety and fitness of operators of dangerous instrumentalities or equipment." Int'l Bhd. of Teamsters v. Dept. of Transp., 932 F.2d 1292, 1304 (9th Cir. 1991) (upholding random drug testing of commercial truck drivers); see also Bluestein v. Skinner, 908 F.2d 451, 457 (9th Cir. 1990) (upholding FAA regulations requiring random drug testing of flight instructors and dispatchers); Int'l Bhd. of Elec. Workers, Local 1245 v. Skinner, 913 F.2d 1454, 1458 (9th Cir. 1990) (upholding random testing of all employees engaged in operations, maintenance, or emergency response functions on gas pipelines).

We have never found random drug testing of employees who perform safety-sensitive functions to be unconstitutional. The Gonzalezes admit that their job descriptions require them to be prepared to perform safety-sensitive functions, and admit that they have performed safety-sensitive functions in the past. They nevertheless argue that their job history shows that they seldom performed these functions, and that therefore they cannot constitutionally be tested. As we said in Cheney, however, frequency is irrelevant. See 944 F.2d at 509. This is particularly true when we are asked to examine an individual worker's job history. The Gonzalezes sought an injunction against future testing, based on the infrequency of their past safety-sensitive activity. But past experience does not determine whether an employee may be called upon to perform a vital safety function more often in the future. Denise may encounter more frequent emergencies requiring her dispatch services; Ruben may be required to drive a bus more often. If an injunction were in place, neither could be tested regardless of how much of an impact their job duties had on public safety.

The district court also concluded that Denise's work conditions kept her around other workers and under a supervisor, so that any drug or alcohol use would be readily observable without testing. We have held, however, that "'The heavy supervision of workers does not negate the need for other mechanisms to

prevent accidents.'" IBEW v. USNRC, 966 F.2d at 527 (quoting IBEW v. Skinner, 913 F.2d at 1460 n.14).

The Gonzalezes also argue that there is no evidence of a drug or alcohol problem in the transit industry. The Supreme Court, however, "has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing." Bd. of Ed. of Ind. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 835 (2002).

We reverse the grant of summary judgment, and we remand to the district court to grant summary judgment in favor of the MTA on the Gonzalezes' claims for injunctive and declaratory relief and damages.

REVERSED AND REMANDED.